PACIFIC & ORIENT INSURANCE BHD v. RASIP HAMSUDI & ORS

HIGH COURT MALAYA, SHAH ALAM
ZALITA ZAIDAN JC
[CIVIL APPEAL NO: BA-12B-64-04-2016]
17 JULY 2017

INSURANCE: *Motor insurance – Claims – Claim against insurer and two others – Insurer added as third defendant – Insurer filed notice of discontinuance before judgment in default entered by Sessions Court – All three defendants found liable – Whether insurer should have been excluded in judgment – Whether judgment irregular – Whether an abuse of process of court – Rules of Court 2012, O. 18 r. 19, O. 19, O. 21 rr. 2 & 3*

CIVIL PROCEDURE: *Action – Discontinuance of – Motor insurance claim against insurer and two others – Insurer filed notice of discontinuance before judgment in default entered by Sessions Court – All three defendants found liable – Whether insurer should have been excluded in judgment – Whether withdrawal of insurer's defence amounted to complete withdrawal of defence to proceedings – Whether judgment irregular – Whether an abuse of process of court – Rules of Court 2012, O. 18 r. 19, O. 19, O. 21 rr. 2 & 3*

CIVIL PROCEDURE: *Judgments and orders – Judgment in default – Motor insurance claim against insurer and two others – Insurer filed notice of discontinuance before judgment in default entered by Sessions Court – All three defendants found liable – Whether insurer should have been excluded in judgment – Whether withdrawal of insurer's defence amounted to complete withdrawal of defence to proceedings – Whether judgment irregular – Whether an abuse of process of court – Rules of Court 2012, O. 18 r. 19, O. 19, O. 21 rr. 2 & 3*

The respondents ('plaintiffs') filed a suit against the first and second defendants in an accident case. The second defendant was a registered owner of a motorcycle WFE 1937 and had taken an insurance policy from the third defendant ('appellant'). The first defendant, the rider of the motorcycle WFE 1937, claimed that on 1 May 2013, he was involved in a road accident with another motorcycle registered number WET 275. The second defendant then claimed that the defence for the suit had been transferred to the appellant. Subsequently, the appellant filed as an intervener at the court proceedings and was named as the third defendant. The third defendant submitted that the present claim was a fraudulent claim by the first defendant. On 31 January 2015, the third defendant filed a notice to discontinue ('the said notice') and served a copy to the plaintiffs. There were two orders made by the Sessions Court. The Sessions Court then entered a judgment in default against all three defendants on 23 March 2015. Secondly, the Sessions Court granted an order dated 28 April 2015 ('order of 28 April 2015) stating all three defendants, including the third defendant, were liable against the plaintiffs. The third defendant subsequently filed an application under O. 18 r. 19 of the Rules of Court 2012 ('ROC') dated 17 November 2015 after being served with the

order of 28 April 2015 with a supporting affidavit stating that the Sessions Court should not include the third defendant as it had filed a notice to discontinue before the judgment was granted under O. 21 r. 2 of the ROC. The third defendant's application was dismissed and hence, this appeal. The issues that arose for determination, *inter alia*, were (i) whether the plaintiffs were correct in law to include the name of the third defendant in the order of 28 April 2015; (ii) whether the third defendant's application under O. 18 r. 19 was defective as it did not provide the rules to remove its name from the order of 28 April 2015; and (iii) whether the judgment in default was regular.

Held (allowing appeal by third defendant with costs):

(1) A defendant is at liberty to withdraw his defence 'or any part of it', 'at any time' without seeking leave from the court. In withdrawing the defence or any particular claim of the defendant, there were conditions to be followed where Form 32 was to be served to give effect on the plaintiff. If a party to the proceedings could not fulfil the conditions stated under r. 2 of O. 21 of the ROC, the party would then have to rely on r. 3 of O. 21 of the ROC. The withdrawal of the third defendant's defence did not mean withdrawal of the whole defence to the action as if there is no defence against the plaintiffs. The withdrawal of the defence was only by the third defendant and not by the first and second defendants. The withdrawal of the third defendant's defence was part of the defence to the action between the plaintiffs and the first, second and third defendants, fulfilling part (a) of r. 2(2) of O. 21 of the ROC. (para 32)

(2) The third defendant denied liability on the collision on the ground that it was a fraudulent claim by the plaintiffs in cahoots with the first and second defendants to claim insurance from the third defendant and the third defendant would not be responsible under the Road Transport Act 1987. As the third defendant's defence had been withdrawn, it was not a complete withdrawal of defence to the proceedings so as to treat it as no defence entered or served which would make O. 19 of the ROC in default to apply as decided by the Sessions Court. (para 33)

(3) The court was cautious to say that the order of 28 April 2015 was a regular judgment when it included the default judgment and nowhere was it mentioned that it had been properly served on the third defendant. This was not a judgment on merits. It was apparent that the order of 28 April 2015 could not be enforced. Therefore based on the facts, it was an irregular judgment and therefore it could not be said to be a reasonable cause of action and not for the third defendant to take up its defence in court. It would be a plain and obvious case if the court were to proceed with an irregular judgment, it would tantamount to a scandalous, frivolous and vexatious claim and no doubt was an abuse of the process of the court. (paras 48-50)

(4) Order of 28 April 2015 was irregular and should be set aside. It could not be cured in any appellate proceedings and even if the third defendant could appeal, he was not bound to do so. As the matter before this court was in relation to the third defendant's application, it was utmost appropriate to strike out its name in the action as pleaded. (para 51)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(dist)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bujang Hj Ulis v. Nancy Abdullah [2007] 8 CLJ 255 HC ***(refd)***

Cepatwawasan Group Bhd & Anor v. Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors [2008] 2 CLJ 620 HC ***(refd)***

Dollah Hj Salleh v. Tuan Hj Muhyiddin Hj Mohd Yassin & Anor [1989] 1 CLJ 198; [1989] 1 CLJ (Rep) 512 HC ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd [1994] 1 CLJ 328 SC ***(refd)***

Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA ***(refd)***

Malaysian Industrial Development Finance Bhd v. Yong Kah Lee [2004] 4 CLJ 769 HC ***(refd)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***

Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors [2017] 4 CLJ 572 CA ***(dist)***

Pegang Mining Company Ltd v. Choong Sam & Ors [1968] 1 LNS 96 PC ***(refd)***

Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***

Ridzuan Ahmad Idrus & Anor v. Mohd Yusof Omar [2017] 1 LNS 759 HC ***(refd)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(dist)***

Tan Boon Huat v. Tan Boon Lee [2017] 1 LNS 406 CA ***(refd)***

Tirumeniyar Singara Veloo v. Malaysian Motor Insurance Pool [2017] 8 CLJ 682 CA ***(refd)***

Woolley Development Sdn Bhd v. Stadco Sdn Bhd (No 2) [2010] 7 CLJ 83 CA ***(refd)***

Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 1 LNS 117 CA ***(refd)***

Legislation referred to:

Road Transport Act 1987, s. 96(3)

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), O. 19, O. 21 rr. 2(1), (2)(a), 3, O. 34 r. 7, O. 42 rr. 8, 10(1), (2), (3), O. 62 rr. 1(1), 6(1), O. 92 r. 4

For the appellant - Vinod Kamalanathan; M/s Vinod Kamalanathan & Assocs
For the respondent - Mabel Sabastian & Rajan Ayappan; M/s Sabastian & Co

[Editor's note: Appeal from Session Court; Summons No: A53KJ-38-02-2014]

Reported by Sandra Gabriel

JUDGMENT

Zalita Zaidan JC:

Introduction

[1] This is an appeal by the appellant who is the third defendant against the order of the Sessions Court dated 11 April 2016 dismissing the appellant's application under O. 18 r. 19 of the Rules of Court 2012 (ROC 2012) to remove its name as the third defendant from the judgment of the Sessions Court Selayang dated 28 April 2015.

[2] There was a civil suit filed by the respondents, who are the first, second and third plaintiffs against the first and second defendants in one accident case. The third defendant filed an application under O. 18 r. 19 of the ROC 2012 dated 17 November 2015 after being served with the Sessions Court's order of 28 April 2015 with supporting affidavit stating that the Sessions Court should not include the third defendant as it had filed a notice to discontinue before the judgment was granted, under O. 21 r. 2 of the ROC 2012.

[3] The issue raised by the third defendant's counsel before this court is whether the plaintiffs were correct in law to include the name of the third defendant in the order of the Sessions Court of 28 April 2015. The third defendant is also praying for O. 92 of the ROC 2012.

[4] The parties, in this judgment will be referred to as they were in the Sessions Court. At times, the terms 'first, second and third defendants' and 'defendants' and 'first, second and third plaintiffs' and 'plaintiffs' will be used interchangeably.

Factual Background

[5] The plaintiffs first filed a suit against the first and second defendants in one accident case on 11 February 2014. The second defendant was a registered owner of a motorcycle WFE 1937 and had taken a policy insurance from the third defendant. Based on the written submission of the third defendant, the first defendant, the rider of the motorcycle WFE 1937, claimed that on 1 May 2013 he was involved in a road accident with another motorcycle registered number WET 275. The second defendant then claimed that the defence for the suit had been transferred to the third defendant.

[6] Based on the records, the third defendant's counsel filed as an intervener at the Selayang Sessions Court proceedings and was named as the third defendant. The third defendant submitted an amended defence dated 21 July 2014 stating out the particulars denying the collision on the basis that it was a fraudulent claim by the first defendant (at pp. 20-23 of the appeal record). The third defendant's suspicion of the fraudulent claim is explained in the affidavit in support of the defence, meting out the discrepancies as to the police reports and the statutory declaration made by the first defendant.

[7] The third defendant claimed that the first defendant made police reports on 23 July 2013 and 31 July 2013, at first stating that the accident occurred at Jalan Desa Utama at a nearby petrol pump station where first defendant claimed that he turned to the left as he was trying to avoid the motorcar coming from the front and he hit the back of the first plaintiff's motorcycle. The first defendant made another police report dated 22 May 2014 denying his involvement in the accident with WET 275 on 1 May 2013. He also made a statutory declaration on 9 May 2014 denying any accident and declared that the police reports made on 23 July 2013 and 31 July 2013 were to assist a friend to make an insurance claim for the injury suffered by the first plaintiff from the third defendant. Based on the foregoing, the third defendant claimed that it filed an application to intervene as it had the legal and financial interest to protect and defend as third defendant in the proceedings.

[8] At about the same time, the third defendant also commenced separate proceedings at the Kuala Lumpur High Court and obtained a declaratory order from the KL High Court declaring that the policy insurance and motorcycle WFE 1937 owned by the second defendant is null and void. On 24 December 2014, the solicitors representing the first and second defendants filed an application to the Sessions Court with an affidavit in support of 22 December 2014 withdrawing themselves from representing the first and second defendants and this was granted on 26 January 2015.

[9] On 31 January 2015, the third defendant filed a notice to discontinue (the said notice) and served a copy to the plaintiff's solicitors *via* letter dated 30 January 2015. On 28 April 2015, judgment was granted by the Sessions Court that all defendants are liable (p. 5 and pp. 105-108 of the appeal record).

[10] It was not disputed that the plaintiffs proceeded with the suit and judgment in default was entered on all the defendants including the third defendant (para. 6 of written submissions of first, second and third plaintiffs and the order is at pp. 105-108 of the appeal record). The plaintiffs served the order of 28 April 2015 where the third defendant was named as a party. The plaintiffs claimed that the third defendant filed an application to remove its name as a party after five months from date of receipt of the order by the Sessions Court. The third defendant's application was dismissed by an order dated 11 April 2016 and hence this appeal.

Third Defendant's Submission

[11] The third defendant advanced several grounds for this appeal and submitted the main issue that is whether the plaintiffs were correct in law to include the name of the third defendant in the order of the Sessions Court of 28 April 2015. It was claimed that a copy of the said notice under O. 21 r. 2 of the ROC 2012 was served on the plaintiffs' solicitors who did not object to either the service nor to the effect of the said notice. It was submitted that the third defendant was only able to file the application to remove its name only after it had received the judgment of the Sessions Court from the plaintiffs' solicitors.

[12] At the hearing, the third defendant's counsel argued that the plaintiffs have no cause of action against the third defendant as the plaintiffs' claim is against the first and second defendants and that plaintiffs have no *locus standi* as third defendant was not involved in the accident and is only an insurer for the motorcycle WFE 1937. The third defendant also claimed that the investigating officer's testimony relates to the first and second defendant's liability of 1 May 2013 and not against the third defendant and submitted that the notes of evidence as in 'rekod rayuan tambahan (III)' reflected no evidence led against the third defendant before the said judgment dated 28 April 2015.

[13] The third defendant argued that the plaintiffs should file for recovery to enforce the judgment of the Sessions Court under s. 96(3) of the Road Transport Act 1987 (RTA 1987) on the third defendant and not against the third defendant as a party to the current action. Counsel for the third defendant relied on the case of *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866; [2011] 6 MLJ 788 Court of Appeal decision, highlighting to this court that where the third party claimant had obtained judgment against the insurer's insured/rider, he must then filer recovery proceedings against the insurers and prove his case against the insurer who is entitled to raise all defences available to the insurers.

[14] It was submitted that a judgment in default (JID) was entered on the defendants on 23 March 2015 and subsequently the Sessions Court made another order dated 28 April 2015. The third defendant's counsel argued that the JID was entered on all the defendants and that the plaintiffs' counsel failed to send the draft order to the third defendant's counsel under O. 42 r. 8 of the ROC 2012 where parties have the right to seek appointment on the draft order which the third defendant was denied.

[15] The plaintiffs' argument was on the basis that it was a JID and need not serve on the third defendant. The third defendant's counsel argued that as it is an insurance company, it would pay judgment sum to what it is liable for when there is a recovery action based on the case submitted *Letchumanan Gopal (supra)*. The court heard that the third defendant was never given the right to give its defence as it was not served in the beginning and pray to this court for the appeal to be allowed.

Plaintiffs' Submission

[16] Based on the written submission, learned counsel for the plaintiffs proffered five grounds against the third defendant's appeal:

(i) sama ada permohonan untuk mengeluarkan nama Defendan Ketiga daripada Penghakiman Tersebut boleh dibuat selepas Mahkamah Sesyen Selayang telah membicarakan tindakan Plaintif dan Penghakiman Termeterai dikeluarkan oleh Mahkamah;

(ii) sama ada Defendan Ketiga adalah salah satu pihak di dalam tindakan Plaintif Mahkamah Sesyen Selayang walaupun menarik balik pembelaan mereka terhadap Plaintif;

(iii) sama ada Defendan Ketiga dihalang oleh prinsip-prinsip undang-undang estoppel untuk membuat permohonan ini;

(iv) sama ada Defendan Ketiga seharus memfailkan satu rayuan terhadap keputusan Mahkamah Sesyen dan bukan satu permohonan dibawah Aturan 18 Kaedah 19(1) Kaedah-Kaedah 2012; dan

(v) Sama ada Aturan 18 Kaedah 19(1) Kaedah-Kaedah Mahkamah 2012 mempunyai peruntukkan untuk mengeluarkan nama Defendan Ketiga daripada Penghakiman termeterai.

[17] The plaintiffs' counsel submitted that the third defendant is estopped from filing the application after the Sessions Court had decided on the plaintiffs' cause of action, arguing that it is trite law that once a decision has been made, the judge cannot decide on the same cause of action. Counsel submitted that by raising the issue as applied by the third defendant, it would be asking the Sessions Court to relook on the same evidence and facts of the case that had been tried. Counsel relied on the authority in the case of *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104 on the principle of *res judicata*:

> ... when a matter, whether on a quantum, whether on a question of facts or law, has been decided between two parties in one suit or proceeding and the decision is final, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again ...

[18] Counsel submitted that there was no fraud issue raised in the action heard at the Sessions Court and that the third defendant had withdrawn its defence against the plaintiffs and was still acting as a third defendant in the proceedings and therefore had waived the fraud issue against the plaintiffs and is estopped to raise it through its application.

[19] In relation to the issue as to whether the third defendant is one of the parties to the proceedings even after withdrawing its defence, counsel submitted that the third defendant is one of the parties as it had received the judgment order from the Sessions Court which is enforceable on the third defendant as it failed to set aside the order or appeal on the order made and relied on the case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysia Finance Bhd* [1998] 2 CLJ 75.

[20] The plaintiffs' counsel again reiterated that as the third defendant had withdrawn its defence which means that the third defendant has no defence at all against the action brought by the plaintiffs and referred to O. 21 r. 2(2) of the ROC 2012 arguing that the third defendant wholly admitted plaintiffs' claim and therefore the judgment could be entered against the third defendant in the action. In addition, counsel argued that the third defendant should have filed an appeal on the Sessions Court decision and not under O. 18 r. 19(1) of the ROC 2012 to remove its name.

[21] Counsel submitted that the third defendant's application based under O. 18 r. 19 is defective as it does not provide the rules to remove its name from the order of the Sessions Court. Counsel also submitted that the judgment was filed on 13 May 2015 and the third defendant took five months, only in November 2015, to file under O. 18 r. 19, to strike out their names.

[22] Counsel submitted that the Sessions Court Judge must decide on the liability for the cause of action taken by the plaintiffs. Counsel referred to the case of *Pacific & Orient Insurance Co Bhd v. Rasip Hamsudi & Ors* [2017] 4 CLJ 572 (Court of Appeal Civil No: W-02(NCVC)(A)-1360-08-2015) on the declaratory order issued by the third defendant which referred to the case of *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947 that there was no need to file recovery against insurers. However, counsel for the plaintiffs informed the court that the Court of Appeal's decision in *Pacific & Orient Insurance v. Rasip Hamsudi (supra)* granted a stay and is pending appeal to the Federal Court.

The Third Defendant's Submission In Reply

[23] Counsel for the third defendant replied to the plaintiffs' counsel's submission that the Court of Appeal's case *Pacific & Orient Insurance v. Rasip Hamsudi (supra)* referred by the plaintiffs' counsel was in relation to the declaratory order under s. 96(3) of the RTA 1987 which is not an issue to strike out its name.

[24] The third defendant's counsel appealing to this court submitted that since they do not wish to be a party to the suit against the plaintiffs, O. 18 r. 19 of the ROC 2012 is the appropriate procedure to strike out as a party. Counsel submitted that there is so much irregularity based on the learned Session Judge's ground of judgment where the decision given was in chambers without the presence of the third defendant's counsel and prayed for the court to grant O. 92 r. 4 of the ROC 2012.

Sessions Court's Decision

[25] The Sessions Court's decision is in the additional appeal record dated 13 July 2016 where some are reproduced here for ease of reference:

> 1. Mahkamah telah mempertimbangkan dan bersetuju dengan hujahan Plaintif bahawa Defendan Ketiga telah gagal mematuhi Aturan 18 Kaedah 19 Kaedah-Kaedah Mahkamah 2012 (Aturan tersebut) yang memperuntukkan bahawa pliding yang difailkan oleh mana-mana pihak boleh dibatalkan atas 4 alasan dan ianya tidak termasuk untuk sesuatu pihak mengeluarkan nama mereka daripada tindakan Plaintif-Plaintif, lebih-lebih lagi setelah tindakan Plaintif-Plaintif telah dibicarakan dan diputuskan oleh Mahkamah.
>
> 1.1 Mahkamah bersetuju dengan Plaintif bahawa permohonan di bawah Aturan tersebut harus difailkan sebelum tindakan Plaintif-Plaintif dibicarakan dan diputuskan oleh Mahkamah.

1.2 Mahkamah telah merujuk kepada kes *Jamir Hassan v. Kang Min* [1991] 1 LNS 41 yang mana Mahkamah dalam kes tersebut telah memutuskan bahawa permohonan di bawah Aturan tersebut harus difailkan sebelum sesuatu tindakan ditetapkan untuk perbicaraan.

1.3 Mahkamah mendapati Defendan Ketiga telah memfailkan permohonan ini lewat dan telah gagal untuk memohon lanjutan masa atau kebenaran bagi memfailkan permohonan lanjutan masa atau kebenaran bagi memfailkan permohonan mereka untuk membolehkan Mahkamah menggunakan budi bicara bagi mendengar permohonan Defendan Ketiga.

2. Mahkamah mendapati Defendan Ketiga telah gagal untuk memohon kepada Mahkamah satu perintah untuk mengetepikan perintah yang dipohon terlebih dahulu untuk dinamakan sebagai Defendan Ketiga di dalam tindakan Plaintif-Plaintif.

2.1 Mahkamah telah merujuk kepada kes *Badiaddin Mohd Mahidin 7 Anor v. Arab Malaysia Finance Bhd* [1998] 2 CLJ 75 yang mana Mahkamah dalam kes tersebut telah memutuskan bahawa apabila Mahkamah yang Mulia telah membuat satu perintah atau satu penghakiman, perintah tersebut akan berkuat kuasa sehingga perintah tersebut diketepikan atau perintah tersebut dirayu dan diubah.

2.2 Mahkamah bersetuju dengan hujahan Plaintif bahawa Defendan Ketiga sepatutnya memfailkan permohonan untuk tindakan Plaintif-Plaintif terhadap Defendan Ketiga sebelum tindakan Plaintif-Plaintif dibicarakan oleh Mahkamah dan bukan memfailkan Notis Pemberhentian di dalam tindakan Plaintif-Plaintif dan selagi perintah tersebut masih berkuat kuasa, permohonan Defendan Ketiga tidak boleh diputuskan oleh Mahkamah ini.

3. Mahkamah juga bersetuju dengan Plaintif bahawa permohonan Defendan Ketiga dihalang oleh prinsip undang-undang "estoppel" untuk membuat permohonan ini.

3.1 Merujuk kepada Aturan 21 (2) Kaedah-Kaedah Mahkamah 2012 dan Aturan 19 Kaedah-Kaedah Mahkamah 2012, setelah Defendan Ketiga menarik balik pembelaan daripada Plaintif-Plaintif, Defendan Ketiga tidak mempunyai sebarang pembelaan terhadap tuntutan Plaintif-Plaintif.

3.2 ..

3.3 Selain daripada itu, perintah tersebut masih berkuat kuasa dan Memorandum Kehadiran Defendan Ketiga yang difailkan masih wujud bagi tindakan ini. Oleh itu Defendan Ketiga masih satu pihak dan tindakan Plaintif-Plaintif.

4. Mahkamah bersetuju dengan Plaintif bahawa permohonan Defendan Ketiga dihalang oleh prinsip undang-undang mantap "*Res Judicata*" di mana liabiliti dan ganti rugi bagi prosiding Plaintif-Plaintif telah dibicarakan dan diputuskan oleh Mahkamah.

A

4.1 Penghakiman tersebut telah dimeterai dan dimajukan kepada Defendan Ketiga oleh Plaintif-Plaintif. Defendan Ketiga telah akui terima penghakiman termeterai tersebut pada 13.5.2015.

4.2 Permohonan Defendan Ketiga secara langsung memohon kepada Mahkamah untuk mengimbas kembali keputusan yang telah dicapai setelah bicara penuh.

B

5. Mahkamah berpendapat bahawa Defendan Ketiga seharusnya memfailkan satu rayuan terhadap keputusan Mahkamah bertarikh 28.4.2015 mengenai liabiliti dan kuantum tersebut dan bukan satu permohonan di bawah Aturan 18 Kaedah 19(1) Kaedah-Kaedah Mahkamah 2012.

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6. Mahkamah juga bersetuju dengan Plaintif bahawa permohonan Defendan Ketiga dihalang oleh prinsip undang-undang mantap "*functus officio*" bagi Mahkamah ini untuk mempertimbangkan permohonan Defendan Ketiga.

D

6.1 ...

a. Defendan Ketiga tidak boleh memfailkan satu permohonan sedemikian untuk mengeluarkan nama mereka daripada tindakan ini setelah tindakan Plaintif-Plaintif telah dibicarakan dan diputuskan oleh Mahkamah ini.

E

b. Mahkamah tiada mempunyai kuasa untuk membuka semula kes Plaintif-Plaintif yang telah diputuskan sebelum ini.

7. Semasa perbicaraan, Mahkamah telah mempertimbangkan keterangan Pegawai Penyiasat yang memberikan keterangan mengesahkan bahawa kemalangan ini telah berlaku di antara Plaintif Pertama dan Defendan Pertama.

F

7.1 Pegawai Penyiasat juga telah memberi keterangan bahawa telah hadi ke tempat kemalangan dan telah mengambil gambar tempat kemalangan dan juga motosikal-motosikal yang telah terlibat dalam kemalangan tersebut termasuk memberi keterangan mengenai kerosakan kedua-dua motosikal tersebut.

G

7.2 Pegawai Penyiasat telah memberi keterangan bahawa berdasarkan hasil siasatan mendapati bahawa Defendan Pertama adalah cuai di dalam kemalangan ini.

8. Mahkamah bersetuju dengan hujahan Plaintif bahawa pada semua masa yang material, hanya Plaintif-Plaintif yang boleh menarik balik tindakan terhadap mana-mana satu Defendan dan bukan sebaliknya.

H

The Court's Finding

[26] This matter was brought by the plaintiffs who filed the suit initially against the two defendants on 11 February 2014. The third defendant filed as an intervener and was named as third defendant to file defence. The third defendant's defence can be found at pp. 20-23 and the first and second defendants' amended defence is at pp. 14-19 of the appeal record. I observed that only the amended statement of claim by the plaintiffs is in the appeal

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record whereas their original statement of claim which was referred by the first and second defendants in its amended defence is nowhere to be found in the appeal record. On 31 January 2015, the said notice was filed by the third defendant to the plaintiffs under O. 21 r. 2 of the ROC 2012 which is at p. 103 of the appeal record and the order allowing the said notice is marked as exh. "NA-6" at p. 100 of the appeal record.

[27] The third defendant's counsel submitted that the Sessions Court had made two orders based on the plaintiffs' counsel's arguments. There was a judgment in default entered against the first, second and third defendants of 23 May 2015. The order of 28 April 2015 found all three defendants liable against the plaintiffs.

[28] The third defendant's counsel submitted that after a copy of the said notice to discontinue was filed on the plaintiffs' solicitors, the plaintiffs' solicitors obtained an order of the court dated 28 April 2015 which included the name of the third defendant as one of the defendants. The third defendant filed an application notice dated 17 November 2015 after being served by the order of the court dated 28 April 2015 together with the supporting affidavit applying for its name to be removed.

The Application - O. 18 r. 19 ROC 2012

[29] The present appeal involves only the third defendant and the plaintiffs. There is a history behind this application. The third defendant was an intervener, not originally a party to the suit but was claiming interest in the action being an insurer for the second defendant's motorcycle where it claimed that there was a fraudulent act based on the police reports and a statutory declaration made by the first defendant. The test in determining for a party to intervene is whether its rights in the action will be directly affected by the order of the court in an action as decided in the case of *Pegang Mining Company Ltd v. Choong Sam & Ors* [1968] 1 LNS 96; [1969] 2 MLJ 52. The intervention was allowed and made as a third defendant in the civil suit brought by the plaintiffs. The third defendant's defence was briefly, denying that there was an accident as reported by the first defendant, that it was a fraudulent claim to get the insurance out of the third defendant and thus the third defendant will not be responsible under the RTA 1987.

[30] The third defendant's counsel contended that O. 18 r. 19 of the ROC 2012 applied by the third defendant on the basis that this is the only avenue to remove their name from the order of 28 April 2015 following the said notice served under O. 21 r. 2. I will quickly touch on the said notice under O. 21 r. 2 of the ROC 2012 before I deliberate on the appeal application under O. 18 r. 19 of the ROC 2012.

Notice Of Discontinuance

[31] Order 21 r. 2 of the ROC 2012 is in relation to a discontinuance of an action or to withdraw, without leave. Following O. 21 r. 2(2)(a):

> 2 (1) The Plaintiff in an action begun by writ may, without leave of the Court, discontinue the action or withdraw any particular claim made by him ...
>
> (2) A defendant may, without leave of the Court:
>
> (a) withdraw his defence or any part of it at any time; or
>
> (b) discontinue a counterclaim, or withdraw any particular claim made by him ...
>
> By serving a notice in Form 32 to that effect on the plaintiff or any other party concerned.

[32] A defendant is at liberty to withdraw his defence "or any part of it", "at any time" without seeking leave from the court. In withdrawing defence or any particular claim of defendant, there are conditions to be followed where Form 32 is to be served to give effect on the plaintiff. If a party to the proceedings cannot fulfil the conditions stated out under r. 2 of O. 21, the party would then have to rely on r. 3 of O. 21. I am unable to agree with the plaintiffs' counsel's contention that the withdrawal of the defence would mean the whole defence to the action as if there is no defence against the plaintiffs. This is on the finding that the withdrawal of the defence was by the third defendant only and not by the first and second defendants. I viewed that the withdrawal of third defendant's defence is part of the defence to the action between the plaintiffs and the first, second and third defendants, fulfilling part (a) of r. 2(2) of O. 21 of the ROC 2012.

[33] I wish to refer to the third defendant's defence in the proceedings as exhibited "NA-4" attached to the affidavit (at pp. 91-94 of the appeal record) where the defence is clearly stated as 'third defendant's defence' (pembelaan defendan ketiga) and the particulars among others which I had earlier pointed out, the third defendant denied the collision, that it was a fraudulent claim by the plaintiffs in cahoots with first and second defendants to claim insurance from the third defendant and the third defendant will not be responsible under the RTA 1987. As the third defendant's defence had been withdrawn, it is this court's finding that it was not a complete withdrawal of defence to the proceedings so as to treat it as no defence entered or served which would make O. 19 of the ROC 2012 in default to apply as decided by the Sessions Court.

[34] This is as explained in the 'ROC 2012 An Annotation, 2012' at p. 431 that if only part of the defence has been withdrawn then the action will proceed in the ordinary way. The approach taken by the third defendant in discontinuing with its defence can be referred to the Court of Appeal decision

of *Tan Boon Huat v. Tan Boon Lee* [2017] 1 LNS 406; (Civil Appeal No: A-02(IM)(NCVC)-644-04-2016) which made reference to the case of *Dollah Haji Salleh v. Tuan Hj Muhyiddin Hj Mohd Yassin & Anor* [1989] 1 CLJ 198; [1989] 1 CLJ (Rep) 512; [1989] 1 MLJ 311 stating that as a general rule:

> such discontinuance or withdrawal shall not of itself operate as a bar to any subsequent proceedings unless it is ordered subject to any terms as to the bringing of a subsequent action under rule 3 thereof. Such term would in our opinion include a prohibition on the commencement of a fresh action based on the same facts.

[35] However, in comparison to the present case, it is unfortunate that the said notice was never decided upon. The fact that the third defendant was brought in as a third defendant rather than as a third party proceedings against the person who is liable or may be liable for all or part of plaintiffs claim must be considered in detail. Generally, liability against defendants in an action can be divisible or indivisible. In the case of divisible, it would mean that all defendants are jointly liable and for indivisible, it is where any one of the defendants can be wholly liable to the plaintiff. In the instant case, I comprehend the avenue sought by the third defendant to withdraw its defence and to be removed from the action as it could not be held liable jointly with the first and second defendants. I viewed that that the third defendant as the insurer, must be given the right to defend and prove for its statutory responsibility.

[36] This is supported by the principle that the said notice must be served on the other party as service of the notice of discontinuance is found to be mandatory: *Malaysian Industrial Development Finance Bhd v. Yong Kah Lee* [2004] 4 CLJ 769; [2005] 2 MLJ 487. In that case, the issue was whether the notice of discontinuance was a triable issue, whether or not it was served by the plaintiff on the defendant as required by O. 21 r. 2(1) that was to be read with O. 62 rr. 1(1) and 6(1) of the ROC 2012. This would require the examination of the documents and the facts before we can venture into the application made by the third defendant.

[37] It was the third defendant's counsel's argument that the only avenue to remove itself from the action is under O. 18 r. 19 of the ROC 2012 and submitted that they relied on parts (a), (b) and (d) of r. 19(1) as it had not been decided on merits, that the dispute against the third defendant was not litigated as pleaded and yet to be proven.

[38] Plaintiffs' counsel's contention is that the third defendant failed to fulfil the four limbs under O. 18 r. 19 and that the judgment had been decided by the Sessions Court. In the context of fulfilling the four limbs, I have to disagree. Order 18 r. 19 of the ROC 2012 provides the four situations and it does not read as to fulfil all four limbs for the reason it provides the word "or" after part (c) and therefore should be read as any of the four. I noticed the four limbs be fulfilled as mentioned by the plaintiffs' counsel as well as the Session Judge in her ground at para. 1.

[39] I stand to be guided by the case of *Cepatwawasan Group Bhd & Anor v. Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors* [2008] 2 CLJ 620; [2008] 2 MLJ 915 where the court held that the principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) are well settled. In addition, I refer to the Court of Appeal case of *Tan Boon Huat (supra)* which made reference to the Supreme Court's decision of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 that quoted Mohamed Dzaiddin SCJ:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v. L & NW Rly Co*).

[40] I now turn to O. 18 r. 19(1) of the ROC 2012 which is about striking out pleadings and endorsements. It provides that:

> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
>
> (a) It discloses no reasonable cause of action or defence, as the case may be;
>
> (b) It is scandalous, frivolous or vexatious;
>
> (c) It may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) It is an otherwise an abuse of the process of the Court,
>
> And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under subparagraph (1)(a).
>
> (3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[41] The third defendant submitted that it wishes to remove its name by invoking part (a) or (b) or (d) of O. 18 r. 19 on the basis that there was no reasonable cause of action or defence or the action is scandalous, frivolous and vexatious or it is an abuse of process of the court as the case was not heard on merits. It is trite law as pointed out in the Supreme Court decision of *Bandar Builder (supra)* and the Court of Appeal of *Tan Boon Huat (supra)* that the principle on any pleading may be struck out only if it is obviously unsustainable where such discretionary power may be exercised only in plain and obvious case. The Court of Appeal in *Tan Boon Huat (supra)* viewed that the burden to prove that the case is plainly and obviously unsustainable rests with the appellant whom applied for the O. 18 r. 19.

[42] What is meant as 'obviously unsustainable' had been scrutinised in a plethora of cases. The root word is not 'unsustainable' but rather the word 'obviously' which denotes that on the face of it, the claim must be plainly or evidently unsustainable in law: *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886; [1999] 5 MLJ 558.

Judgment In Default

[43] This is where we need to revert to the facts. There were two orders made by the Sessions Court. First was a JID entered against all three defendants on 23 March 2015. Secondly, the order of 28 April 2015 stated all three defendants are liable against the plaintiffs. After careful perusal on the chronology that took place, I find that the purportedly JID was entered after the third defendant had filed the said notice to the plaintiffs' counsel. The plaintiffs' counsel also contended as submitted in the notes of proceedings that there is no need to file the draft order to the third defendant for approval as it remained as a party to the action and the judgment would be enforceable on the third defendant. Counsel for the third defendant submitted that if the contention of remaining as a party to the action stands, it would mean that the plaintiffs' counsel have failed to forward the draft order dated 28 April 2015 to the third defendant's solicitors for approval which would also be in breach of O. 42 r. 8 of the ROC 2012.

[44] The third defendant's counsel pointed to this court that the plaintiffs' counsel affirmed in its affidavit in reply (at p. 76 of the appeal record), pleaded that there was no need for the draft order to be sent to the third defendant's solicitors for approval as it was a JID. At the hearing, it was submitted that the decision granted on 28 April 2015 was made in chambers and without the presence of the third defendant's counsel.

[45] So much going on, the procedure on the judgment default may have inadvertently overlooked by the Session Judge which is the missing link contributing to the convoluted facts before this court. A JID of appearance may be set aside or varied unconditionally. This principle had been upheld in a number of cases and the test is whether it is an irregular JID which the defendant is entitled to have it set aside. I have referred to the Court of Appeal case in my recent decision concerning setting aside a JID this year, in the case of *Ridzuan Ahmad Idrus & Anor v. Mohd Yusof Omar* [2017] 1 LNS 759 (Rayuan Sivil No: BA-12A-25-04-2016). I made reference to the Court of Appeal case, *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 1 LNS 117; [2008] 5 MLJ 112 which referred to the Supreme Court case of *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Bhd* [1994] 1 CLJ 328; [1994] 1 MLJ 312. In *Yap Ke Huat & Ors v. Pembangunan Warisan Murni* (*supra*) the Court of Appeal held at p. 120:

> [15] It is trite that when considering to set aside a judgment in default, the first task is to ascertain whether it is regular or irregular judgment. If it is an irregular judgment, then the default judgment ought to be set aside *ex debitio justitiae*. If it is regularly obtained, then the principle

A expounded in *Evans v. Bartlem* [1937] AC 473 applies - see the judgment of the Federal Court in *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 MLJ 312. This requires the defendant to show that he has a defence on merits. Delay in making such an application is a factor to be considered by the court in deciding whether to grant or refuse the application - see *Tuan Haji Abdul Rahman v. Arab-*
B *Malaysian Finance Bhd* [1996] 1 MLJ 30.

[46] The issue arising here, first and foremost, whether the judgment given by the Sessions Court was a regular judgment? It is pertinent to verify as to whether the JID had been effected on the third defendant that is the means of bringing to its notice the action being taken. I refer to the authority of
C *Woolley Development Sdn Bhd v. Stadco Sdn Bhd (No 2)* [2010] 7 CLJ 83; [2011] 6 MLJ 111, a Court of Appeal decision where the respondent who was the plaintiff in that case had obtained a judgment irregularly by purportedly filing a summons in chambers to apply to enter judgment under O. 34 r. 7 of the Rules of the High Court 1980. It was held that in the absence of relevant
D particulars being pleaded in the statement of claim and subsequently reproduced in the judgment, it would amount to ambiguity and uncertainty that,

> the Court always retain a discretion to set aside a judgment entered by default because it is not a judgment on merits. …

E

[47] Again, as decided in the Federal Court case of *Hasil Bumi Perumahan (supra)*, based under O. 42 r. 10(1), (2) and (3) of the RHC 1980 where the judgment in default was irregular it must be set aside *ex debitio* and all issues raised that are substantial and had merits must be tried at a proper trial. On this basis, let's look at the order of the Sessions Court.

F

[48] The order of 28 April 2015 (also at p. 5 and pp. 105-108 of the appeal record) where the third defendant was included, an extract in parts is reproduced here clearly stated that:

> PENGHAKIMAN
>
> G TINDAKAN ITU setelah dipanggil untuk bicara pada 23.3.2015, 07.04.2015, dan seterusnya dipanggil pada hari ini untuk keputusan dihadapan Tasnim Binti Abu Bakar Hakim, Mahkamah Sesyen Selayang dalam kehadiran Mabel Sabastian peguam bagi pihak Plaintif bersama sama dengan Rajann Ayappan Counsel bagi Pihak Plaintif dan dalam
> H ketidak hadiran Defendan-Defendan
>
> Setelah membaca hujahan bertulis pihak peguamcara Plaintif MAKA DIPUTUSKAN DAN ADALAH PADA HARI INI DIHAKIMI tanggungan adalah 100% terhadap kesemua Defendan.
>
> MAKA ADALAH PADA HARI INI DIHAKIMI quantum atas dasar
> I 100% adalah bahawa Defendan Defendan hendaklah membayar Plaintif gantirugi am untuk kecederaan Ringgit Malaysia Tiga Ratus Ribu (RM 300,000) sahaja dan Kos Jagaan sebanyak Ringgit Malaysia Enam Juta Satu Ratus Tiga Puluh Empat Ribu Lima Ratus Lima Puluh dan Sen Lapan Puluh Sembilan (RM6,134,550.89) sahaja, Kehilangan Gaji ...

...

AKHIRNYA ADALAH JUGA PADA HARI INI DIHAKIMI Defendan Defendan hendaklah membayar kepada peguamcara Plaintif kos mengikut skala ... (RM96,579.35) sahaja.

...

In the same order of 28 April 2015, it was mentioned the trial dates of 23 March 2015, 7 April 2015 and date of judgment on 28 April 2015. The cost listed as attached to the order includes the 'penghakiman ingkar' cost. I would be cautious to say that the order was a regular judgment when it included the default judgment and nowhere mentioned that it had been properly served on the third defendant. To put it simply, this was not a judgment on merits.

[49] It is apparent that order of 28 April 2015 could not be enforced. As decided in the case of *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37, a Federal Court decision that was referred in the *Woolley Development* case *(supra)* stated:

> The general rule is that when an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon - in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Lord Diplock LJ (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

Therefore, based on the facts, it was an irregular judgment and therefore it could not be said to be a reasonable cause of action and not for the third defendant to take up its defence in court.

[50] I also look at the two other points taken before this court which is whether the plaintiff's action is scandalous, frivolous and vexatious or an abuse of the process of court. In view of that, references must be made to the earlier cases referred as guidance, the case of *Hasil Bumi Perumahan (supra)*, *Woolley Development (supra)* and also the case of *Bujang Hj Ulis v. Nancy Abdullah* [2007] 8 CLJ 255; [2007] 4 MLJ 363 where the plaintiff had breached procedural rules and procured a default judgment which was found to be not only a nullity but also an illegal judgment. There is a serious point of law in the instant case which requires serious discussion and an objection should be taken on the pleadings. On that basis, it would be a plain and obvious case if we were to proceed with an irregular judgment, it would tantamount to a scandalous, frivolous and vexatious claim and no doubt is an abuse of the process of court.

[51] Based on the foregoing, I find that the purportedly judgment of 28 April 2015 was irregular and should be set aside. It could not be cured in any appellate proceedings and even if the third defendant could appeal, he is not bound to do so: *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37. As the matter before this court is in relation to the third defendant's application, it is utmost appropriate to strike out its name in the action as pleaded.

[52] In relation to the argument for recovery action, I do not wish to delve into this matter as this is the statutory responsibility of the third defendant as insurer which is a separate issue under the purview of s. 96(3) of the RTA 1987. I pointed out the case of *Tirumeniyar Singara Veloo v. Malaysian Motor Insurance Pool* [2017] 8 CLJ 682 (Civil Appeal No: W-02(NCVC)(A)-1717-09-2016), a Court of Appeal decision which held that the policy insurance covers not only the insured and insurer but may extend the coverage to an authorised driver. However, this could not be verified and proven as the merits had not been heard by the Sessions Court. In addition, the case referred by the plaintiffs' counsel, the Court of Appeal decision in *Pacific & Orient Insurance Co Berhad v. Rasip Hamsudi & Others* (*supra*) was on the declaratory order appeal and the Court of Appeal stated that the issue of alleged collision and the fraudulent claim, were "not properly the subject of the saman pemula-2 proceedings at the High Court or in this appeal" and the matter is pending appeal at the Federal Court.

***Res Judicata* and Estoppel**

[53] For the reason of completeness, I will answer briefly that these issues are irrelevant as the judgment given by the Sessions Court was an irregular judgment. The cases submitted by the plaintiffs' counsel, *Badiaddin Mohd Mahidin & Anor v. Arab Malaysia Finance Bhd* [1998] 2 CLJ 75 and the case of *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673 are cases where the judgment was regular and therefore they are of no guidance to the present case.

[54] In light of the above reasons, I allow the appeal as pleaded by the third defendant with cost.